No. 20-843

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL.,

Petitioners,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF UNITED STATES SENATOR TED CRUZ AND 24 OTHER U.S. SENATORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI*[1]

Amici are United States Senators:

Ted Cruz
Mitch McConnell
John Barrasso
Marsha Blackburn
John Boozman
Mike Braun
John Cornyn
Tom Cotton
Kevin Cramer
Mike Crapo
Steve Daines
Josh Hawley
John Hoeven
Cindy Hyde-Smith
Jim Inhofe
Ron Johnson
James Lankford
Mike Lee
Cynthia Lummis
Roger Marshall
Jerry Moran
Jim Risch
Marco Rubio
Rick Scott
Thom Tillis

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[1] All parties have consented to the filing of this brief. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *Amici* and their counsel, make a monetary contribution to fund its preparation or submission.

Amici are deeply committed to the United States Constitution, its foundational principle of limited government, and its guarantees of fundamental individual rights. One of the most important of these rights is the Second Amendment's guarantee of the right to keep and bear arms. That constitutional right implements the historic right of armed defense of self, family, state, and nation, as well as the right to use arms for other lawful purposes. *Amici* have sworn to "support and defend the Constitution," and they have an abiding interest in conveying their views in support of the Second Amendment against depredations by any or all of the Legislative, Executive, or Judicial branches of the federal or state governments.

INTRODUCTION AND SUMMARY OF ARGUMENT

The inclusion of an individual right in the Constitution reflects the Framers' determination not only that the benefits of guaranteeing that right outweigh the costs, but that no future legislature—including Congress—should have the ability to second-guess that determination. The Court of Appeals below nevertheless balanced the constitutionally-guaranteed right to keep and bear arms against legislatively asserted interests as if the two were comparable in either weight or kind. They are not, and treating them as such was error.

The right to keep and bear arms was enshrined in the Bill of Rights and later incorporated against the states through the Fourteenth Amendment. As a *right*, guaranteed to "the people," any person within

its ambit may exercise the right without permission, justification, or defense. And no legislature may transform the right into a mere privilege by reweighing or diminishing the policy considerations already resolved by the Framers. Rather, any purported limitations on the right must be based on the history and contemporaneous understandings of the scope of the Second and Fourteenth Amendments.

Amici accordingly agree with petitioners that the State of New York's regulations on personal carry of arms for self-defense violate the Second Amendment. They nevertheless write separately to emphasize that legislators—whether in Albany or Washington, D.C.—have neither the power nor the authority to second-guess the policy judgements made by the Framers and enshrined in the Constitution. The competing risks and benefits of firearms were certainly no mystery to the Framers and ratifiers. Yet they still chose to enshrine the right to keep and bear arms in the Constitution, and later chose to incorporate that right against the states. Their decision to guarantee the right of the people to keep and *bear* arms after weighing all the policy considerations is definitive.

Thus, while specific subsets of persons might fall beyond the general policy balance in the Constitution itself—such as dangerous criminals—any prohibition would have to distinguish such restricted class from the mass of "the people" in general. Any justification for restricting carry that applies equally to all is contrary to the Constitution and to the very notion of a right of the people.

ARGUMENT

I. The Second and Fourteenth Amendments Already Weighed and Resolved the Competing Risks and Benefits of the People Keeping and Bearing Arms.

In *District of Columbia v. Heller*, this Court said what should be obvious about constitutional rights: "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. 570, 634 (2008). "The enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Id*. at 636.

The text of the Second Amendment—we leave the inevitable rehashing of historical meaning and practice to others—makes clear that the Framers took at least three policy choices off the table:

1. The Amendment enshrines a "right," not a mere privilege or suggestion subject to legislative revision or retraction.
2. It is a right that belongs to "the people" generally, not merely to some select few.
3. The right is not merely to "keep" arms, but to "bear" them as well.

By making the bearing of arms a "right," the Framers made the policy choice to relieve "the people" of any obligation to justify their exercise of that right. By definition, a person exercising a right does not need permission from the state. *See* 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 87 (Peter Laslett rev.

ed., Cambridge Univ. Press 1963) (1698); 1 WILLIAM BLACKSTONE, COMMENTARIES *123;[2] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 604 n.32 (1976) (Brennan, J., concurring) (emphasizing that longstanding constitutional doctrine effectively places an absolute prohibition on prior restraints). Specifically, at the time of the ratification of the Second or of the Fourteenth Amendment, the right to bear arms was "enforceable in court" and occupied "the status of supreme law." Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 568, 576 (2017). Most importantly, that right could not "be altered or abolished by the ordinary laws." Letters from the Federal Farmer VI (1787), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 979, 983-84 (John P. Kaminski, et al. eds., 2004).

Similarly, by guaranteeing the right to "the people" generally—something that is equally true of other *individual* rights that the Constitution protects, such as those guaranteed by the First, Fourth, and Ninth Amendments—the Framers made the choice to grant the right to every person included in "the people." Any effort at excluding one or more classes of persons must therefore be based on something that distinguishes them from the "people."

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[2] Blackstone's *Commentaries* were quite popular in colonial America and were regularly consulted by everyday subjects of the Crown as well as justices of the peace. Julius S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW, 451, 454 (David H. Flaherty ed., 1969).

Finally, the inclusion of the right to "bear" arms, as well as to "keep" them, reflects a decision by the Framers and ratifiers that the right applies both at home and out in the world. Each of those choices reflect a balancing of the costs and benefits and a decision that the benefits outweighed the costs.

When the Framers balanced the costs and benefits of guaranteeing the right to keep and bear arms, they understood the dangers of firearms. In 1619, the English barrister and legal thinker Michael Dalton updated his treatise's definition of "dangerous weapons" with the word "Gunn" so that the definition went on to read: "Gunns, Daggs, or Pistols." MICHAEL DALTON, THE COUNTREY JUSTICE: CONTAINING THE PRACTICES OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 31 (London, Printed for the Societie of Stationers 1619). And a snap-shot survey spanning 1674-1789 analyzed over 1,500 cases from London's Old Bailey, and its data suggests that guns were employed for either criminal enterprises or lawful uses (such as self-defense). *See* Clayton E. Cramer & Joseph Edward Olson, *Pistols, Crime, and Public: Safety in Early America*, 44 WILLAMETTE L. REV. 699, 715 (2008).

Indeed, this Court has recognized that the right to keep and bear arms contemplates confrontation and potential danger. As *Heller* articulated, to "bear" means to "wear" or to "carry *** upon the person or in the clothing or in a pocket, for the purpose *** of being armed and ready for offensive or defensive action in a case of conflict with another person." 554 U.S. at 584 (cleaned up). To "bear" something means to carry it; and "[w]hen used with 'arms,' *** the term has a

meaning that refers to carrying for a particular purpose—confrontation." *Id*.

Moreover, because gun violence was common in England and in the American colonies during the seventeenth and eighteenth centuries, the Framers understood that some individuals would abuse the right to keep and bear arms by using firearms for illicit purposes. *See* Cramer & Olson, *supra* at 712 n.71 (citing JOHN WINTHROP, WINTHROP'S JOURNAL: HISTORY OF NEW ENGLAND 1630-1649, at 27, 153, 180, 275 (James Kendall Hosmer ed., Charles Scribner's Sons 1908); *Id*. at 712 n.77 (PA. GAZETTE newspaper articles: criminal shooting from inside a barricaded home (Apr. 20, 1749); attempted robbery in Lancaster County, Pa. (Oct. 27, 1763); and attempted robbery in Bush Hill, Va. with a pistol and blunderbuss (June 27, 1787)); The Proceedings of the Old Bailey, *Trial of Richard Cooper, Apr. 1731*, OLD BAILEY PROCEEDINGS ONLINE, https://www.oldbaileyonline.org (ref. no. t17310428-73); *Weaver v. Ward*, 80 Eng. Rep. 284, 284 (1616). Even the risk of interpersonal confrontation and violence was well understood, given the occasional resort to duelling and attention-grabbing that existed then. *See* Alison L. LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 HOFSTRA L. REV. 501, 502 (2004) ("[P]eople dueled—in the United States, as recently as the latter decades of the nineteenth century.").

But just as the dangers and risks of arms were obvious and understood, so were the benefits. Defensive uses of weapons, both inside and outside the home, were well known to the Second and Fourteenth

Amendments' Framers and ratifiers. *See*, *e.g.*, CLAYTON E. CRAMER, ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE 107 (2006) (citing JOHN WINTHROP, *WINTHROP'S JOURNAL* 272-73, 345 (1825)) (recounting two self-defense killings in Massachusetts Bay Colony, including one with a long gun); The Proceedings of the Old Bailey, *Trial of John Poultney, July 1682*, OLD BAILEY PROCEEDINGS ONLINE, https://www.oldbaileyonline.org (ref. no. t16820712-13) (defendant who had wounded and disarmed the aggressor in self-defense out in the street was found not guilty). Famously, when defending English soldiers who were accused of the Boston Massacre, their lawyer (and our second President) John Adams averred that "[t]he injured party may repel[] force with force in defence of his person, habitation, or property." John Adams, Argument for the Defense: 3-4 Dec. 1770 *in* 3 LEGAL PAPERS OF JOHN ADAMS (L. Kinvin Wroth & Hiller B. Zobel eds., 1965), https://founders.archives.gov/ documents/Adams/05-03-02-0001-0004-0016) (cleaned up).

And the self-defense benefits of the right to bear arms continues to this day.[3] *See*, *e.g.*, The Heritage

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[3] *See*, *e.g.*, Dan Atkinson, *Police: Man fires gun to break up robbery in Franklin Park*, NEWS 7 BOSTON (May 9, 2021), https://whdh.com/news/police-man-fires-gun-to-break-up-robbery-in-franklin-park/ (man attempting to rob woman thwarted by armed bystander); Addie Haney, *Armed citizen detains suspect after attempted robbery, shooting at Colony Square Chick-fil-A, police say*, 11ALIVE.COM (Mar. 8, 2021, 4:30 PM), https://www.11alive.com/article/news/crime/attempted-robbery-shooting-colony-square-chick-fil-a/85-b2e9ab34-68cc-

Foundation, *Defensive Gun Uses in the U.S.*, HERITAGE.ORG (Apr. 13, 2020, updated July 16, 2021), https://datavisualizations.heritage.org/firearms/defensive-gun-uses-in-the-us/ (data visualization regularly updated); Travis Fedschun & Bradford Betz, *Texas Church Shooting: Gunman Kills 2, 'Heroic' Congregants Take Down Shooter*, FOX NEWS (Dec. 29, 2019), https://www.foxnews.com/us/texas-church-shooting-texas-injured-active (armed church congregants thwarting mass shooting in the face of attacks by gunman who fatally shot two parishioners); Ryan Laughlin, *Shots fly as father, son nearly robbed at ATM on Albuquerque's West Side*, KOB4 (May 17, 2021, 5:15 PM, updated May 18, 2021, 6:39 AM), https://www.kob.com/ albuquerque-news/shots-fly-as-

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489e-9cf6-cc66facc60ef (armed Chick-fil-A patrons detaining armed robber by using their own guns until police arrived); Dan Koob, *Carjacking Victim Shoots Suspect in Head in Center City, Philadelphia Police Say*, CBS3 PHILLY (Feb. 16, 2021, 9:15 AM), https://philadelphia.cbslocal.com/2021/02/16/philadelphia-police-shooting-carjacking-victim-carjacker/ (would-be carjacking victim defending himself by shooting armed carjacker); Hasan Karim, *Report: Clerk in Springfield fires shots at would-be-robber*, SPRINGFIELD NEWS-SUN (Feb. 4, 2021), https://www.springfieldnewssun.com/news/police-are-investigating-attempted-robbery-at-springfield-convenience-store/T6WIKPVUNVGNTHEAA47QFSB4SQ/ (armed employee of convenience store firing shots at armed robbers who had demanded that the employee give them money from cash register); CBS 17 Digital Desk, *Man shoots, kills thief during attempted robbery in Durham, police say,* CBS17.COM (Jan. 9, 2021, 10:03 PM), https://www.cbs17.com/news/local-news/durham-county-news/man-shoots-kills-thief-during-attempted-robbery-in-durham-police-say/ (would-be victim fatally shooting armed robber in front of beauty store).

father-son-nearly-robbed-at-atm-on-albuquerques-west-side/6111387/ (father deploying pistol to defend himself and his son from armed robbers who attacked them as they were making ATM withdrawal); Renatta Signorini, *Teen charged as adult in Jeannette shooting; 2nd shooter acted in defense, DA says*, TRIBLIVE.COM (Apr. 23, 2021, 12:04 PM), https://triblive.com/local/westmoreland/ teen-charged-as-adult-in-jeannette-shooting-2nd-shooter-acted-in-defense-da-says/ (mother firing shots, at attacker who shot her son on the street).[4]

In short, the Framers and ratifiers of both the Second and Fourteenth Amendments knew that the risks and benefits of arms—criminal misuse and defense against the same—were inextricably intertwined in the very concept of "bearing" arms. They weighed those considerations and chose a broad right to keep and bear arms, rather than broad discretion to disarm the public, as not only the best solution, but one to be enshrined as the supreme law of the land—above any contrary choice made through mere legislation. They chose to level the playing field

[4] And sometimes, some of our Nation's most vulnerable citizens desperately need the right to bear arms—as a matter of life and death. *See*, *e.g.*, Dorian Geiger, *Elderly Florida Man Shot Intruder To Death After Suspect Smashed Through Glass Door And Began Attacking His Wife, Authorities Say*, OXYGEN.COM (May 29, 2020, 8:48 AM), https://www.oxygen.com/crime-news/nathan-edwards-fatally-shot-by-elderly-man-during-home-invasion (title self-explanatory); Ashley Remkus, *No charges filed in deadly shooting in Madison County*, AL.COM (May 4, 2020), https://www.al.com/ news/2020/05/man-shot-to-death-in-madison-county.html (woman shooting fiancé in self-defense when he showed up at her home and attacked her in domestic-violence altercation.

by ensuring that the people would have the means to defend themselves from those who would improperly threaten or use force against them. And those concerns are "as great outside as inside the home." *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012); *Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017) ("After all, the Amendment's core lawful purpose is self-defense, and the need for that might arise beyond as well as within the home.") (cleaned up).

Amici strongly agree that the Framers struck the correct balance in the Second and Fourteenth Amendments. But whether members of Congress, state legislators, or any other elected official agrees with this balance does not matter. What matters is that the Framers' balancing was incorporated into the Constitution and may only be reweighed by *amending* the Constitution—not by legislative resistance or judicial fiat. As sitting members of the United States Senate, *amici* will defend Congress's powers and prerogatives, but also respect the authority and supremacy of the Constitution when, as here, it takes a policy decision from their hands.

Modern legislatures or courts may not upset or chip away at the constitutional balance between the risks and benefits of a right of the people to keep and bear arms—any more than they may permissibly modify the Constitution's eligibility requirements for Members of Congress or the President, or the bicameralism and presentment procedure for enacting laws. *See Luis v. United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring in judgment) (stating that when "[t]he People, through ratification, have

already weighed the policy tradeoffs that constitutional rights entail" those tradeoffs are "not for us to reevaluate"); *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 486–87 (1989) (Kennedy, J., concurring) ("It is improper for this Court to arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution."). The Framers and ratifiers of the Second and Fourteenth Amendments decided to protect public carry *precisely* because they wanted to insulate that right from legislative second-guessing.

* * *

As applied to this and similar cases, therefore, neither legislatures nor the courts can validly cite the intrinsic dangerousness of guns as a justification for restricting their carriage. Arms are, and have always been, dangerous to the persons against whom they are used.[5] That danger was never obscure, was very much part of the reason law-abiding citizens needed arms for protection from others with arms, and any risks from the bearing of such tools were deemed inferior to the benefits. Any claimed justification that is premised on the general dangerousness of guns or other arms thus is invalid on its face.

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[5] Indeed, due to the state of medical science at the time, gunshot wounds had a significantly greater likelihood of causing death at the time of the Framing than they do today. *See generally* Roger Saadia & Moshe Schein, *Débridement of Gunshot Wounds: Semantics and Surgery*, 24 WORLD J. SURGERY 1146 (2000).

II. Any Limitations on the Scope of the People's Right to Keep and Bear Arms Cannot Override or Reweigh Choices Already Made by the Constitution.

Turning to the particular law at issue in this case, petitioners correctly note, *see* Pet'rs' Br. 41, 48, that allowing only a select few members of the public to bear arms and requiring those few to distinguish themselves from "the people" in general, turns the Second Amendment on its head. The constitutional choice made in 1791 was that the "right" to bear arms belonged to the undifferentiated people, with historical exceptions only in cases of dangerousness due to lack of capacity or demonstrated and dangerous criminal disposition. *See*, *e.g.*, *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) ("[The legislative] power [to prevent people from possessing guns] extends only to people who are *dangerous*. Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons."). New York's policy choice that *only* those with a severe and distinguishing need for self-protection are entitled to exercise the right to bear arms is precisely contrary to the policy choice made in the Constitution itself to extend the right broadly and to make it a right, not merely a discretionary privilege.[6]

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[6] A similar principle applies to efforts to restrict broad classes of "arms." "A weapon may not be banned unless it is *both* dangerous *and* unusual." *Caetano v. Mass.*, 577 U.S. 411, 417 (2016) (Alito, J., concurring in judgment). "[W]hen the weapon belongs to a class of arms commonly used for lawful purposes," it does not meet this test. *Id*. at 418. Indeed, properly understood,

Similarly, the Second Circuit's sweeping deference to New York's amorphous and nebulous legislative judgment that a broad general right to carry would be detrimental to public safety, *see* Pet. App. 2, 11–12, flies squarely in the face of the diametrically *opposite* judgment made by the Framers and ratifiers of the Second and Fourteenth Amendments. The risks of an armed populace were more than evident in the 1700s and 1800s when armed crime and violence were obvious dangers; yet, the choice was made to reify the population's right to defend itself rather than be defenseless. Whether current legislators might have made a different choice is not only irrelevant, but also anathema to any proper constitutional analysis. Policy debates are relevant when *drafting and approving* a constitutional amendment, not when *interpreting* an amendment that has taken those policy choices "off the table." *Heller,* 554 U.S. at 636.

Each of these choices made by New York and endorsed by the Second Circuit involved the same questions confronted by the Framers and ratifiers of the Second and Fourteenth Amendments but answered very differently. While New York would

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any subclass of dangerous and unusual weapons should be limited to "dangers" beyond those intrinsic to common weapons in general. To meet such a limiting definition, a "dangerous" weapon should be readily capable of inflicting collateral damage well beyond the natural consequences of a weapon generally. Fragmentation grenades, nuclear devices, and bazookas might fall into this category, whereas handguns, pistols, revolvers and semi-automatic rifles will not. Anything short of this standard would create a loophole in the Court's Second Amendment jurisprudence that is large enough to swallow it altogether. And that New York may not do.

accord the right to carry for self-defense only to a select few who could identify, to the satisfaction of a government functionary, a severe need that was distinct from that of "the people" in general, the Constitution provides for a right of the people *broadly* to choose for themselves how great or small their need might be and to keep and bear arms accordingly.

And while New York views the public safety risks of criminal or negligent misuse to outweigh the benefits of bearing arms for self-defense by the people in general, the Constitution again makes the opposite choice and elevates the right of armed self-defense over the risks that some will misuse such arms. In both instances, however, it is the policy views of New York that must yield to the choices embodied in the Constitution—*not* the other way around. That New York would weigh things differently is not a substantial or important state interest. In fact, it is a facially invalid interest that conflicts with the choices made by the Constitution.

CONCLUSION

Firearms policy can be complex, and members of Congress, like state and local officials, may disagree vehemently. But elected officials swear to support and defend the Constitution, and so must respect when the Framers took a decision out of their hands. The Second Amendment's guarantee of the right to keep *and* bear arms cannot be second-guessed by legislators across the country who simply disagree with the choice the Framers made.

Because the Second Circuit abandoned the authoritative choices made by the Second and

Fourteenth Amendments and instead meekly deferred to the alternative preferences of New York, this Court should reverse the decision below.

Respectfully submitted,

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